

# THE CONTRIBUTION OF BUSTHANUL ARIFIN IN LEGISLATING ISLAMIC LAW IN INDONESIA

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**Abstract:** *This paper will elaborate the idea and the effort of Busthanul Arifin in the process of formalizing Islamic Law into an Indonesian national law. The heritage of colonial law has hindered the agenda of Islamization of law in Indonesia mostly by the negative reaction of the ruler. This fact consequence to an uneasy relation between Islam and Political ruler as it is shown along the Indonesian independent era. In this 'war of interest', most of the time Indonesian Muslim should subjugate their interest. Learned from this trouble relation of Islam and political power in the early of independent era, Bustanul Arifin should be marked for his effort to melt the tension and tries to persuade the Indonesian new order ruler in order to obtain and fulfill the aspiration of Muslim people.*

**Key Words:** *Busthanul Arifin, Legislation, The Compilation of Islamic Law, Act No. 7/1989, New Order Era*

## INTRODUCTION

The attempt to make way of Islamic Law into national legal system has always encountered difficulties. As a country with ideology 'Pancasila', in which said that the freedom of religion is guaranteed, Indonesian Muslim in fact has still experienced restriction and has not been given enough room to conduct their religion fully and completely. This is more upsetting since Muslims are the majority of Indonesian population. The attempt to legislate Islamic law become a state law has always been prevented by parties who disagree with this idea. They have thousand arguments in their hands. Among others is that the idea to insert Islamic Law into national law will be incompatible with spirit of pluralism, for it has behind it the idea to build Islamic state and to bring to life back the Jakarta Charter (Piagam Jakarta).

Busthanul Arifin is an actor who struggles for the enactment of Islamic Law in Indonesian legal system. He is former deputy chairman Supreme Court surrounding Religious Court (Tuada Uldilag). Also, he is a professor in Graduate School of IAIN (now State Islamic University) Syarif Hidayatullah, Jakarta. Equipped with legal expertise, Busthanul put a big effort to include Islamic Law as integral part of Indonesian national law. In this effort, Busthanul not only has to face the challenge from new order politician whose view is secular but also from groups of Indonesian legal scholars who said that Islamic Law should not be adopted into Indonesian law. Even, some Muslim scholars take side with this view, because of which they are be considered as non-committed Muslims.

Through his own way, Busthanul, finally, successfully ensure the new order ruler regarding the importance of legislating

Islamic Law in Indonesia. Soeharto at that time fully trust Busthanul, so much so that Busthanul can freely and creatively produce regulation and ordinance which accomodate the need of Muslim community.

This writing is intended to elaborate the thinking of Busthanul Arifin and his contribution in legislating Islamic Law into the national legal system, especially in increasing the respect to Religious Court and in giving birth the regulation Act No. 7/1989 about Religious Court.

## BIOGRAPHY

Busthanul was born in Payakumbuh, West Sumatera, on 2 June 1929. He is the youngest children of the six brothers from father Andaran Gelar Maharajo Sutan and mother Mrs. Kana. The little Busthanul get his basic education formally at the Dutch school. However, like all Minangkabau children at his age generally, Busthanul also took his education from *Surau*. In Minangkabau, *Surau* does not only function as the place to conduct religious ritual and to teach religious knowledge. More than that, *Surau* has long functioned as media of transferring traditional values such as good character, courage, motivation, and struggling power. In *Surau*, beside reciting Alqur'an and studying traditional religious knowledge, the traditional sport of *silat* is also taught. *Surau* become the effective place to educate the children of Minangkabau.

After the country got its sovereign recognition, Busthanul left for Jakarta to continue his education to senior high school. After finishing this level in 1951 he then continued his education to Gajah

Mada University in Faculty of Law. During his study in the university, Busthanul is an activist in student organization of Himpunan Mahasiswa Islam (HMI, Islamic University Student Association). He even had chance to become the chief for Yogyakarta branch in 1954-1955. His another activity is to teach in senior high school in Yogyakarta. (Ahmad 'ed.', 1996: 13-17.

To the end of the year 1955, having had graduated from Law Faculty UGM, Busthanul began his career as a Judge in Semarang and in the cities around such as Kendal, Salatiga, Demak and Purwodadi. Still, he continued to be a teacher in one of private school. At that time, he and his friends including the former chief of Supreme Court and the former chief Public Prosecutor, Soerjadi and Imam Bardjo respectively, were doing pioneer work to create the University of Semarang, later on known as Diponegoro University. Because of his deeper knowledge on Islam, Busthanul was elected by his friends to teach subject on Islamic Law, contradict to his request to teach Law of Crime, relevant to his major. Above all, Busthanul had been taking part in creating the Islamic University of Sultan Agung (Unisula) and has conducted as the first rector (Arifin, 2001: 116).

During the time of the Communist Party revolt, Busthanul occupied High Judge in the High Court of Middle Java province. This era is the difficult time along the walk of his career. This is said so because he experienced terror from the communist group who has an aversion to his position as an activist in Islamic student organization, then forced him to resign from his occupation. After the revolt, in 1966-1968, Busthanul was promoted to be the Chief of the National High Court in South Kalimantan

province. Next, he gained higher position as Supreme Judge, in which he placed position as Chief Judge in the sector of Religious Court (Tuada Uldilag). Busthanul got pension in 1994.

In 1980, Busthanul was awarded extraordinary Professor by State Islamic University Syarif Hidayatullah Jakarta and in 1993 this university gave him Doctor Honoris Causa. In his speech for the award, the director of the university Harun Nasution stated that Busthanul is one of the very little Indonesian Muslim intellectual. He is a legal practitioner that consistently work for the improvement of education and Islamic legal institution, especially for broadening the authority and the competence of Religious Court. He made different efforts to struggle for the application and legislation of Islamic Law into national legal system. (Arifin, 2001: 45)

In his pension age, Busthanul put his time to transfer his knowledge by teaching in State Islamic University Syarif Hidayatullah Jakarta. He has been a senior lecturer in graduate faculty of this institution.

## THE VIEW OF BUSTHANUL ON ISLAMIC LAW IN INDONESIA

Busthanul comments that most of Indonesian Muslims often make mistakes in understanding Islamic Law. They don't differentiate between Islamic Law of *syari`a* and that of *fiqh*. According to Busthanul, this confusing influence the effort of Indonesian people in formulating their national law. Busthanul asserted,

*"...as long as the two terms not been clarified, the talk on a national law will be useless since we don't have a clear definition. The inability to understand the difference of the two terms*

*by many Muslim make us difficult to discuss about Islamic law in Indonesia and even about Indonesian law itself, which has not taken its clear shape to this day...."* (Arifin, 2001: 31)

Etymologically, the word *`syari`a* (*syari`at*) means "a way road to spring or water" or "a narrow trail to be followed". *Syari`at* also means a way of the river stream. (Manzhur, 1990: 175) Terminologically, the *ulama* defines the *syari`at* as "the law of Allah concerning the deed of man, as an obligation, optional, or rulings of requirement, reasons, and hindrance." (Abu Zahrah, 1957: 6) Almost the same is the statement given by al-Laits (94-175 H/712-791 M), as it is quoted by Ibn Manzhur that "*syari`at* is the determination of Allah to His servants such as fasting, praying, pilgrimage, marriage, and so on." (Ibn Manzhur, 1986: 382).

The *syari`at* has characteristic of absolute and standart, meaning universal and unchangeable. As such, there barely rulings which are detail and specific in the Qur'an. The two sources of Islam; Qur'an and Hadith, in most of the cases only explain the rulings in general and give general principles. Busthanul emphasized that *syari`at* is "*kalam nafsi azali*" on which only Allah knows the meaning and the purpose. This *kalam nafsi* was broken down to the wording in the form of Qur'an for the benefit of human being. This *kalam nafsi*, next, was being given explanation by the Prophet's Sunnah. Hence, the main sources of *syari`at* are the Qur'an and Sunnah.

The *syari`at* will not be known without Qur'an and Prophet's Sunnah. But, in Busthanul's point of view, to the two sources must be added reason. Allah has given reason to human being so that they are able to understand the teaching and

the rulings of syari`at in Qur'an and Sunnah. The result of reason understanding is what we call as fiqh (*fiqh*). Thus, we recognize the existence of fiqh Hanafi, fiqh Syâfi`i, fiqh Mâliki, and fiqh Hanbali. As the reason is the quality of human being, the knowledge of fiqh will never be absolute. The status of fiqh is conditional, relating to the time and place. (Busthanul, 1996: 41-42)

When we mention Islamic Law, what we mean is the fiqh. This Islamic law of fiqh, however, according to Busthanul, has gone through such a long history. It has passed the era of tragedy "Siffin and Karbala", the era of many Islamic dynasties since the dynasty of Umayyad, Abbasiyah, Usmani, and others. Moreover, the inheritance of Islamic law that we received has become crystallized packages, which take form as mazhabs and schools. The followers of each mazhab respectively claimed that theirs are the most correct one, in spite of the fact the absence of this claim whatsoever from the founder of any mazhab.

Above all, these all legal packages were written and discussed in the origin and birthplace language, i.e. Arabic, not in the language of Indonesian people. It can be imagined how big is the problem and how much are the works will come up with the plan to straighten out our Indonesian law. The first thing to be agreed is that it is a must that the law of Indonesian people should be in Indonesian language. Second, it has to be realized that the fiqh which Indonesian inherit is the law formulated in *taqlîd* era of almost 8 centuries long. As such, Indonesian should be able to liberate itself from the law assigned for the old predecessor centuries ago.

The enactment and the legislation of Islamic law is the fundamental need of Indonesian Muslim in the time being. The 'Ummah' has now affiliated themselves to different groups, schools, and opinions. This condition made more complex and difficult when the identity of nation is concerned. The heterogeneous society of Indonesian in religion, race, and culture need a certain and definite rule that can accommodate all components of society. In this kind of nation life, the society cannot be ruled out with unwritten law as it is in formerly ethnic society. The law should be formalized in the ordinance or act and be put in to effective with a certain procedures. By this method, every single citizen is expected to get informed and understand the law, which is of their right as a citizen. To be able to formalize the law, the terminology of the law, first of all, should be unified and agreed. The consequence is that Indonesian people should have a law in their own national language, that is Indonesian language.

For Indonesian people who own a certain mother language, but also consisted of different ethnics with different language to each other, the idea of enacting Islamic law really needs a deep thinking, a careful strategy, extra hard works, and the same perception as well as mutual understanding from each parties involved, especially concerning what they mean it to be Islamic law. (Busthanul, 1996: 33-34)

Having had differentiated the term of syari`a and fiqh, in Busthanul's view, Indonesian people will step forward to solve the basic problem on the perceived contradiction between civil law and syari`a law. In fact, this conflict is merely in surface (*quasi conflict*). It may happen that the rulings recognized in civil

law is different, not found, or even contradict with fiqh law of classical or middle time, but it doesn't mean that these rulings contradict, and so deviate the syari`arulings. (Busthanul, 1996: 42)

The idea behind Busthanul's assertion to clarify the terms of syari`a and fiqh is his obsession to modify a law grown in Indonesia land as an integral part of fiqh (Islamic law), which will attach to and be fully applied by Indonesian society. Busthanul has strong commitment to the application of Islamic teaching in the law practiced by Indonesian Muslim, even though his education is on secular law. Busthanul is not only known as a legal practitioner but also popular as a legal scholars. The obsession of Busthanul which is kept deep down from the time he sit as a judge in Semarang in 1956 is to create a unification of law in the society life and proliferate Islamic values to this national law. Islamic teaching will become spirit and guidance for the law prevail in the nation of Indonesia. This is the very idea and the mainstream of Busthanul thinking that always he echoed in every possible chance he had.

Busthanul maintained that the Dutch politic of law toward Indonesia in previous time still influence and hold the thinking of Indonesian legal scholars and experts till the time to this day. The effect is very clear and comprehensive. In this matter, the colonial rezim of Dutch has succesfully, by utilizing academic method, manipulate the argument and stray the logic in such a way that brings out the conclusion and the idea of the contradictory within the three systems of law; Islamic law, Adat law, and Western law (Dutch law and Continental law). (Busthanul, 1996: 36)

In fact, far before the coming of the Dutch and they colonize Indonesia, Busthanul explained, Islamic law has prevailed in some Indonesian society. It had, even, been developed centuries by Islamic Kingdom in the Archipelago. To this fact, even one of Dutch senior legal scholars, L.W.C. van den Berg, concluded that it is Islamic law which become the positive law in Indonesia at this time. This view of van den Berg later on theoretized as *Receptio in Complexu*. In his opinion, the acceptance of Islam, meaning the status of being Muslim, is the condition of one's acceptance to all the teachings and rulings of Islam. This is the logic that works in the acceptance of religion since religion is a way of life and rule of life. If happen in one or two cases the person deviate or absence in doing his religion, or conduct different rituals or teachings, this is not necessarily principal but only an artificial disobeyance.

The Dutch government themselves at that time, about the mid of 18th century, had made effort to collect and codify books on Islamic law for the use of Judges in the court (*landraad*) and the ruling executives. This is evidenced by the wellknown *compendium* which was produced by contemporary rulings, themselves also were legal experts. For example, *Compendium van Clootwijk*, himself was being governor of Sulawesi (1752-1755) and *Compendium Freijer* by Governor General Jacob Mossel (1750-1761).

In 19th century, the colonizer strengthen their power over the Archipelago. In order to consolidate their domination, the colonizer executed the Dutch law for all groups of population, including Indonesian native. This is called unification theory. However, this unification of law was defeated by group of legal experts within colonizer, which

is led by C. Snouck Hurgronje. His theory is known as "reception theory". This theory finds its complete form scientifically in the hand of van Vollenhoven.

To Snouck Hurgronje, the law that is carried out by Indonesian society is basically the adat law. They only accept Islamic law to the extent that it accords the adat norm that they support. Thus, Islamic law merge into adat law and was placed as part of it. (Snouck Hurgronje, 1995: 53-204) Meanwhile, van Vollenhoven is often entitled as "the founder of adat law". This is implied in the title of his book *"Het Ondekking van het Adatrecht (the Finding of Adat Law)"*. In principal, van Vollenhoven provoked that the native of Indonesia (formerly said as "Hindia Belanda" since the word "Indonesia" frighten the Dutch) has long lived under the perfect and organized system of law, that is the adat law. Alfian gives his analysis concerning this theory of reception. The Dutch wanted that the Indonesian adopt the culture and the paradigm of European people so that their colonization agenda not be disturbed and can be worked out well. (Alfian, 1987: 44) For this purpose, the Dutch use the strategy of approaching the adat groups. The Dutch saw that these groups of adat functionaries would be more willing to cooperate with the Dutch government.

The politic of law of the colonizer that brought out the idea of contradicting Islamic law and adat law has likely been successful to influence some Indonesian legal scholars until the time of after independence. Among these scholars is Soepomo, a Java aristocrat. He tries to negate the existence of Islamic law in Indonesia. He gave example on the practice of inheritance law. In his opinion, adat law of

inheritance is more appreciated than Islamic inheritance law because in adat law the adopted children are given portion, and this law is broadly put into practice by Java people. (M.B. Hooker, 1978: 104)

Indonesian society themselves, according to Busthanul, don't understand the adat law essentially. What familiar to them is the word "adat" only. The terminology of "adat law" is the creation of van Vollenhoven, himself said that this term was his finding. This fact brings us to conclude that adat law is an artificial law, formulated or constructed by van Vollenhoven, but then got its scientific analysis for the use of something other than academic concern. (M.B. Hooker, 1978: 37)

Since then, i.e this 19th century, the view of contradicting the three legal systems existed in Indonesia spread. Even from the day of independence till to this day, we are not able to straighten up the law of our country. It is very clear that this problem is influenced by the legal policy of the colonizer in the past. This trickery of the colonizer become a stumbling block that buried in the mentality of many Indonesian learned, and always come out in a sudden whenever Indonesian society tries to create their national law.

Busthanul explains further that what is crucial to solve and to discuss extensively is about the way to reach the agreement in perceiving and conceiving the term "Islamic Law" and the definition about "law". As long as we can't achieve this, then Islamic Law will remain blur and become the object of debate and quarrelling within this kind of Indonesian heterogen society.

Busthanul also said that as a free and autonomous country, and as a modern and plural country, Indonesia in no way and forcefully must solve the dualism and the contradiction between civil law and Islamic law. The civil law adopted from Western, of course, can't be discarded arbitrarily and unfairly, especially for the fact of its agreement with Islamic law in some points. (Busthanul, 1996: 47)

In the era of Abdurrahman Wahid's presidential era, there happened a debate to contradict Islamic syari'a and state. President Abdurrahman Wahid himself refused to apply Islamic syari'a by reason that Indonesia is not an Islamic state. But to Busthanul, the statement of Abdurrahman Wahid is clearly mislead. Possibly, Gus Dur (Wahid's nickname) mention it informally and in the context of joke. It need not be considered, however, since Gus Dur didn't not have academic background on law.

Islamic law or Islamic syari'a is one separate system of law, which was convinced by Muslim as God given law come to them through the prophet Muhammad Saw. Having had this nature, Islamic law does not depend on the form and ideology of state. The prevailed law in Indonesia is mostly the law of the colonizer, ex. the written civil law (*Boergerlijk Wetboek, BW*). This law has been enforced until now although it contains Christian positivistic moral. That is also the case for Criminal law. The book of Criminal Code (KUHP), still written in Dutch, is based on the value of Christian religion. Does the enactment of these laws change Indonesia to be a Christian state? The answer is not. The example on this case are many, said Busthanul. Singapore is a secular state, but the family and personal law for Muslims

society is relied on Islamic law. That's why we find Syari'a justice (*Syari'a Court*) in such secular state of Singapore. While in Philippine, they have allowed Muslims to execute Islamic law since 1977, with the consequence of the existence of syari'a justice everywhere. It looks like the "Jakarta's Charter" adopted by Philippine. In India, since in 20th century there prevailed *Syari'a Act* (kind of syari'a ordinance). In Srilanka, we will find around 32 *Syari'a Tribunal Courts*, a body that handles the cases between Muslims. Even in Israel, surprisingly, we can find Syari'a court albeit it attaches to National courts. All these countries are not declared as Islamic country and their Muslim population is minority. (Busthanul, Bulletin Dewan Dakwah Islamiyah Indonesia, no. 19, 2nd Jum'at, Mei 2001)

In Indonesia, although its constitution stated in chapter 29 that "The State shall be based upon the belief in the One and Only God", it manifested very least. Yes, that is only an obligation to put it in the opening of Judicial dictum, "By virtue of Justice based upon the belief in the One and Only God". For The Religious Court, the High Court and Supreme Court add to it the word *Bismillâhirrahmânirrahîm*.

Surprisingly, why does the word syari'a become a political haunting along the history of the country, and become an instrument to marginalize Muslim people? The answer is this is the result of the colonial politic of law, under the design of Snouck Hurgronje. They colonize Indonesian and limit the implementation of syari'a. The Dutch government at this time supported and gave facility to Muslim to conduct their individual ritual, or *diyân* part of syari'a (*'ibâdah mahdhah*),

but they were silent regarding the application of law, or *qadhâ'i* part of *syari`a*. With this political strategy, the colonizer has not only discarded the Muslim law but also disintegrated the unity of Muslims and their nation family, Christian people. (Suminto, 1996).

The consequence of the against Muslim to Christian by Dutch is not lasting and essential. For example, Indonesian Christians have enjoyed their marriage law enacted for almost 40 years. But when Muslims proposed for Muslim marriage law 1973, the House of Representatif frontally rejected by reasons that Indonesia is not a Muslim country. They forgot that the legal system of the people is nothing to do with the state-form. Moreover, Indonesia has declared constitutionally to accomodate the ideology 'believe in the one God', meaning recognized the religion. (Suminto, 1996)

Such is the view and the frustration felt by Busthanul concerning the conflict of legal system that happened in Indonesia. The Dutch colony has tightly suppressed the law of Muslim people. What they do is to create the competitor for Islamic law in order that Islamic law clash with the practice of Muslim and get isolated from their life. Amazingly, the colonizer did not make effort for the clash of Islamic law with their civil law. In contrary, they fully espoused for the superiority of adat law over Islamic law.

The next part of this paper will talk about what Busthanul did in his effort to insert Islamic law into the integral national law. For example, his effort to promote the rank of Religious Court and to pass the ordinance no. 7/1989 on Religious Court.

## **THE PROMOTION OF THE IMAGE AND THE STATUS OF RELIGIOUS COURT**

Busthanul took action in the field of law within the atmosfere of Old Order (Orde Lama) regime which is under the influence of Indonesian Communist Party (PKI) in one hand, and in the other hand of New Order (Orde Baru) regime which played the policy of otoritarianism and was unsympathetic with Muslims group. In the beginning of his presidential office, Soeharto also ran therepressive attitude toward Muslims. There spread among the policy maker of the new order regime the anxiety of Islam politicif Muslim society have chance to display their religion. They learned from the experience of Old Older regimein which Islam (conducted by political party of MASYUMI) grown as a solid power to the extent that the regime need to arrange a strategy to weaken and stop this Muslim power.

Facing the uneasy attitude of the New Order, Busthanul took a low profile action. As a Muslim legal practician with long experiences to witness the failure of Islam politic in the era of Old Ordergovernment, Busthanul seems to understand that Muslims society should not face the New Orderregime as enemy. They have toplace them as partner so that the Muslims can achieve what they need. Through this strategy, Busthanul built a nice relation with Soeharto, the power man, to the effect that he can work out his agenda to legislate Islamic law as national law. Including to discard the theory which the Dutch inherited about the contradiction of Islamic law to adat law and western civil law.



Concerning the existence of Religious Court, it is a historical fact that this court has been found in Indonesia since 1882. At that time, the Religious Court has already functioned to solve the legal cases on personal and family law of Muslims people, such as marriage and inheritance. However, by the time the colonial politic of law finally marginalize the Religious Court and restrict its competence, even made it lost its function as a court.

As a legal practician who spent his life to this problem, Busthanul has in his hand many factual datas and individual experience on this case of denigration. For example, at the time he sit as a judge in Middle Java, one day he was leading a court session on "podium oath" (*sumpah mimbar*) in Great Mosque of Middle Java. This trial is about the method and the way to do the oath processing and to say the oath sentence done in the podium of the mosque, brought to the court by a party as a civil legal case in general court. The case said that the party who will take oath should be dressed like a dead body. The oath was declared in front of the main Judge, while the oath processing conducted by the Head of the Religious Court.

What shocked Busthanul is the incident by the time he come with groups from Court of First Instance (Pengadilan Negeri) Semarang and the head of Religious Court welcomed them and pay homage to them exaggeratedly. Especially when Busthanul was opening his shoes, the head of Religious Court suddenly bend his body and help to open his shoes, take the shoes and then put them to shoes-shelf. Eventhough Busthanul has tried to prevent him –Busthanul realized that they are in the same level of judge position –that judge of Religious

Court did it very fast. According to Busthanul, this action imitated the practice of the colonial era. The colonizer build the perception that the general court is the *Landraad* (the court of the colonizer). This also explain to Busthanul the fact of the strong influence of the Dutch colonization and domination to the mentality of our Religious Court's judge, so far so that they felt inferior from the judge of the general court. (Busthanul, 1996: 13).

That event also tells us that the ignorance about the importance of Religious Court is not exclusively the case of non-Muslim. Even some of Muslim figures, leader of Islamic mass-organization and Islamic political party were to trap into the colonialist's paradigm and way of thinking. In the year 1956 when he and some of his friends from IKAHI (Ikatan Ahli Hukum Indonesia, the Association of Indonesian Legal Experts) have a meeting with Burhanuddin Harahap –at that time Prime Minister of Indonesia and a leading figure in MASYUMI– to talk about the work-plan of IKAHI to widen the court competence, including Religious Court, Burhanuddin Harahap unexpectedly answered, "*what is important in the time-being is that our constitution said that Indonesia is a religious country. Other things with relate to mechanism, institution and e.t.c., including court will follow Islamic.*" Busthanul felt startled to listen the answer. Burhanuddin is a legal scholar and the concept proposed by IKAHI is using a legal approach, not political. (Busthanul, 1996: 165).

This is also shown by Hazairin, himself a Muslim distinguished scholar and he rejected insistedly the theory of Receptie of Snouck Hurgronje as the "Theory of Devil". As it is noted by Daniel S. Lev, Hazairin didn't agree

with the importance and the competence given to Religious Court under Indonesian legal system. When Religious Court (Mahkamah Syar'iyah) will be created in Palembang, Hazairin reject it. Next, when he sit as Resident in Bengkulu, he also frontally denied and opposed the case of inheritance be brought to Religious Court. (Daniel S. Lev, 1972: 88) He even suggested that Mahkamah Syar'iyah be dissolved. Certainly, the statement of Hazairin hurt the Muslim people. This is so since they know that Hazairin is one Indonesian Muslim leading scholar, a Muslim legal expert, and one that is struggle against the colonialist politic of law. This behavior of Hazairin seemed to collapse the reputation of Hazairin in the eye of Muslim people. Lev himself described this attitude of Hazairin as to be arrogant toward the Religious Court, not different from the attitude of non-Muslim or modern secular scholars. (Daniel S. Lev, 1972: 88)

Toward the birth of Act No. 7/1989 on the Religious Court, the inferiority and the weakness of Religious Court reached its peak. The decision of Religious Court is justified only after getting confirmed or stamped by District Court, as it is determined in the Act 14/1970 on the Court's Competency. Because of deep and all over influence of colonialist politic of law, the inferior stamp of the Religious Court is not easy to remove even after the country got its independence. This can be seen from the fact that the Religious Court always become political object of quarrelling among Indonesian people themselves, i.e. between two groups mentioned above. Since the first day of independence in the year 1945, there has repeatedly efforts done regarding the Act

or government instruction, be it from the pro's to the Religious Court or the con's. The first group struggle for strengthening the status of Religious Court and the second for weakening or even diminishing it.

In 1948, there appears a draft of Act, the leader of which was assigned to R.M. Wirjono Prodjodikoro, in his position as a Judge in The Supreme Court. This drafted Act is about the rulings on Court Competency, based on the Constitution chapter 24 and 25. In the draft, there mentioned all kinds and all levels of the courts in Indonesia, into which the Religious Court is included. In this draft, the status of Religious Court as the instrument of legal competency is genuine, not just a political rumor. With this ruling, the Religious Court get a real equal position with general courts. In short, this legal draft will straighten and return the basic right of the court that has been torn by the colonialist politic of law. Unfortunately, the draft stayed as a draft. It never come out to practice. The most ironic one is the fact that the rejection come also from the Muslim religious leader and Muslim Parties. This information was reached by Busthanul from the first direct source, i.e. the leader of the team Wirjono Prodjodikoro. He told Busthanul later on when he had sit as the head of The Supreme Court. This ironic incident repeated again in 1996, when the chairman of The Supreme Court ask to the Minister of Religious Affair a candidat for the office of supreme Judge in the unit of Islamic Law. As can be seen, The Act No. 13/1965 said that the Supreme Court has three units; Unit Civil Law, Unit Criminal Law, Unit Islamic Law.

Among the requirement for the office of Supreme Judge is academic background in law. The Minister of Religious Affair at that time proposed two names: K.H. Ibrahim Hosen and KH. Syukri Ghazali, but these names were rejected by DPRGR. Since then, there are no news anymore. There is no more chance for the position of judge for Islamic law unit. Busthanul said that this is an irony because since a long time ago Indonesian Muslim has struggled for the execution of Islamic law in Indonesia. However, when they have this chance, they don't use it seriously, not to say neglect it. This is because Muslim people themselves didn't understand well Islamic law itself. They already felt satisfied with the physical building of the court without reserved to the credibility and the quality of the court.

Hence, Religious Court stays undeveloped and stagnant, and considered itself inferior just as the colonialist designed it. It is a court without having its real function. In order to awake and make those Islamic leaders and scholars realize the situation, in every and different chance Busthanul meet them, he always quotes a piece of sentence of Umar ibn al-Khaththab directed to Abu Musa al-Asy`ari, i.e. : *Lâ yanfa`u takallumu bi haqqin, lâ nafâz lah* (No use talk about right without doing that). That is true, the Religious Court at that time was entitled to decide and to do session for the cases brought to them. However, it was the general court that has right to execute. Then, in 1950 there is an Act which regulated that the court be united (UU No. 1/1950). In this act, the adat court that has had existed since the colonial time, was abolished. In the contrary, the Religious Court was even strengthen, but

with the previous competence and order. This means it stays unchanged from what the Dutch created it. (Daniel S. Lev, 1972: 88)

Next, in the year 1956, when Busthanul was just appointed to be a Judge in Semarang, the main board of IKAHI (the Association of Indonesian Legal Experts) and placed in Semarang which was headed by Surjadi S.H., appointed Busthanul as the secretary. The main board of IKAHI formulated Court Competency to be proposed to Constituant Team that will have its first meeting right after the election 1955. As has been known, task of the Constituant Team is to replace the interim constitution with the new one. The main board of IKAHI perceived that chapters which regulated Court Competency in the interim constitution were not enough and did not include all kinds of the courts there are at this time, such as Religious Court. Busthanul were asked to persuade Muslim group to make them agree that the Religious Court put within the regulation of constitution, which was going to be formulated by Constituant Team. Of course, the goal of IKAHI's main board in this case is to get support from Muslim leaders for the demand they proposed to constitution. Busthanul still remember well the persons from the main board of IKAHI who were asked to do this task of persuading. They are; Prof. Suropto was sent to nationalist group, Astrawinata –at that time the chairman of state court in Bandung–to communist group, and then Busthanul to Muslim group. Astrawinata was afterward proposed by communist group to be minister of Justice.

Busthanul then left for Jakarta. The first thing he did was to come and meet Wirjono

Projodikoro (The Chairman of Supreme Court) to inform his task. When Wirjono knew that Busthanul will persuade Muslim group to goal the proposal of IKAHI, he was very enthusiastic and supported it directly. He asked Busthanul whether it was possible to ensure Muslim leaders. Busthanul said that in majority Muslim leader agreed to put Religious Court under regulation of the constitution. "when I said this wirjono showed his happiness," said Busthanul. Busthanul knows the reason. Wirjono is happy because the draft on Court Competency proposed in 1946, which at that time got rejection, was belonging to him. At the time, he was very disappointed of the rejection from Muslim leaders. Now, when Busthanul come and bring the conception suits to Wirjono's, and even more perfect, of course he is happy. This new concept is more perfect because in it the matter of court competency was proposed to be comprehensively regulated in the constitution. Moreover, the Religious Court will be counted as an instrument of state competency in the field of judication. As Busthanul said, the chairman of Supreme Court was so happy that Busthanul was given a long advice to do the work. Wirjono explained, "to face Muslim leaders, you must be able to show that the Religious Court is one of the instruments of justice, so it must be ruled with the same rulings as that applied to the rest courts; general courts and e.t.c. To face non-Muslim group, the argument is not long, i.e. "Muslim people urgently need one court which is good and can realize its real and fundamental meaning as a court. Since non-Muslim has owned this, it is a must that Muslim have one." (Daniel S. Lev, 1972: 88)

What is more, Busthanul was asked by this Chairman of Supreme Court to do persuasion also to Muslim leaders from different organizations in Bandung. In Jakarta, before he continued his journey to Bandung, Busthanul met Mohammad Natsir, Leader of MASYUMI. At that time, Natsir was a respected man in the political arena of Indonesia. It is easy for Busthanul to be able to meet him. Busthanul gave the messages from the main board of IKAHI. Again, the message is to gain the goal of making Religious Court effective and substantially be counted. This can be done only by putting it under regulation of the constitution together with other courts as one package of justice instrument in Indonesia.

These experiences will never be forgotten or will be kept well by Busthanul. He is very sure that the irrespective and uncounted position of Religious Court is the result of and the success of colonialist politic of law, called by him as "the politic of Bamboo cracking". For almost a hundred years, the Religious Court has become the object of Dutch's politic of law. The success gained by Dutch with this politic of law can be explained shortly as follows. There happened two divisions of Indonesian society, one against the other, each faced the other as enemy. One party is Christian people together with those academicians who considered themselves intellectual and modern and higher than other Muslim intellectuals. The other party is Muslim people. The group of Muslim people finally closed themselves and was exclusively away from legal development in the society because they considered that the law prevailed in the society was Dutch's law.

It was this fact that has motivated Busthanul to develop Religious Court. Once he was promoted to be a Judge, he has obsession to higher the status of Religious Court to the same rank and level with other courts in Indonesia. When he sit as junior chairman in Supreme Court for office of Islamic court, Busthanul formulated concept, scheme, and plan to increase the image of Religious Court, which he entitled as "the concept of straightening out the perception on Syari'at Islam".

There are three strategic plans which Busthanul would like to work out based on this concept.

1. Promoting and advertizing Religious Court. This is by introducing Religious Court to different parts of society and clarifying misunderstanding on its nature and function. The fact of its existence for over a century in Indonesia didn't free itself from misunderstanding, ignoring and unknown, by non Muslim and even by Muslim;
2. Consolidating the prevailed law. This is about three foundations for the work of law in the country, taken from doctrine of national law introduced by Body of Restoring National Law (BPHN, Badan Pembinaan Hukum Nasional), at that time headed by Dr. Teuku Muhammad Radie, SH;
3. Compiling Islamic Law. This idea in fact has been being campaigned by Busthanul since 20 years before, starting from the time when he gave one speech in Banjarmasin where he worked as Head of Higher Court in 1967. (Daniel S. Lev, 1972: 171-172)

The three plans were not informed by Busthanul to anyone. Also, he didn't spread

it to society. Even, to the internal of Supreme Court, to his friends in this office, Busthanul didn't talk and discuss it. That's why his judges colleague did not know and understand well the idea and the work-design of Busthanul regarding the position and place of Religious Court in Indonesian legal system and order. Only the Head of Supreme Court, the Late Mudjono S.H., that Busthanul informed for he think it was only this man that would determine whether his plans can be worked out or not. Later on, it was based on this concept formulated by Busthanul that the management and the programs of developing Religious Courts was implemented in 1982 till 1991.

Busthanul used the term "Advertising" in his first plan. Using this term, Busthanul defined Religious Court as a commodity. To this purpose, the Religious Court had to be clothed and made up beautifully and interestingly to be able to attract the costumer, in this case the user. In fact, the Religious Court, just like Islamic law, was really needed to be arranged and presented interestingly. Especially when the historical journey and political decay it has gone through and faced was already too long, far and abundance. All these political and historical walk of Islamic world to far extend has cracked out and degraded the image and the concept of Islamic law. Moreover, when Islamic countries experienced domination and falled in the hand of western colonialist, the colonialist brought their culture and forced it to Muslim society. This is what generally happen in Islamic worlds.

In Indonesia, to sell Islamic court, meaning to sell Islamic law, finds its importance and urgency. This is said so because Dutch already

played political legal trickery that created legal contradictory between Islamic Law, Adat law, and Western law (trikotomy of law). As such, the term "selling and advertising" used by Busthanul is an effort to show to the proponents of the other two laws about the real picture and the meaning of Islamic law itself. By doing this, Busthanul wanted to form a same understanding and same perception about Islamic law, and next Islamic court. In other word, advertising Religious Court is a conditioning society's expectation to Religious Court. A reconstruction of the meaning of Islamic law and a rehabilitation of the name of Islamic court is forcefully needed.

Advertising Islamic court is directed to two parties, i.e. internal and external. Internal group means people worked in the Islamic court itself. There must be self-confidence in the personil of Islamic court, be them as a judge or as an administrative worker. There is no reason that they do not, since their status are the implementer of the justice power exactly the same as those other justice power. External group are those related government's officials and functionaries and society generally. To this group, we have to explain that the tasks and the competencies given to Islamic courts are not less important than that conducted by other courts.

Busthanul has got impressions and conclusions that the main cause and fundamental origins of misunderstanding between Muslim group with Islamic knowledge background and those with non Islamic knowledge background, is related to terminology gap. One party used Islamic legal term and the other Western legal term, the second of which was our positive law language since colonization era. This is the

view we see all over the world that Islamic law always misunderstood. As we know, even the single word 'religion' has different meaning in Islam and West. What is more to other terms.

Beside, the official in Department of Religious Affairs showed the attitude of untrust to the Supreme Court office. In 1977, for example, the Supreme Court issued Law No. 1/1977 which allows cases from Military Court and Islamic Court brought to appeal to the Supreme Court by the litigants. This is a new rule. Previously, the law suits in these two kinds of courts get its final decision just in the hand of higher courts, i.e. for cases from Military Court in the hand of High Military Court and for cases from Religious Court in the hand of High Religious Court. Meanwhile, the Act on Court Competency (UU No 14/1970) determined that all cases from all kinds of courts can be brought to appeal to Supreme Court, as the highest judgement for all courts in Indonesia. However, the procedural law for this act has not had existed excepted in 1977.

The Act of Supreme Court No. 1/1977 was welcomed happily by people in military courts. The military corps (TNI is the new stand for previously known as ABRI) force for the supreme courts to receive the appeal coming from lower military courts. Surprisingly, this is not the situation in the Religious Court environment. There appears disagreement within the *ulema* (religious scholars). Director of Religious Court in the office of Department of Religious Affairs, Ichtianto, without permission of the Minister Alamsjah Ratu Perwiranegara, issued a press release (Surat Edaran) for all Religious Courts in Indonesia that forbid them to bring the proposed appealed

cases to Supreme Court. In Ichtiyanto's view, the new act doesn't have its basis. To this fact Busthanul criticizes as the mentally defect of Muslim people, especially the mental defect of the official in the Department of Religious Affairs, which was intended by colonial politic of law. Muslim people excluded themselves and considered that the judges in the Supreme Court were not able to handle cases coming from Religious Court. They view that there has no one judge from general courts can be considered as Ulama by having sufficient knowledge on Islam. With this reason these judges can't be trusted to handle cases of Religious Courts. (Busthanul, 2001: 230-232)

This is the challenge that had appeared to Busthanul when he was awarded to be junior chairman in the Supreme Court, whose main task was primarily to take care of the technical judiciary aspects in the Religious Court. This task firstly pertains to reconstructing the legal structure or legal organization or hierarchy of law previously messed up by colonialist political policy during hundred years. Slowly but surely, Busthanul walk his plans according to his principles to achieve the goal of straightening and improving the status of Religious Court.

## **COMPOSING LEGAL DRAFT ON RELIGIOUS COURT**

Within the atmosphere of New Order Political Era, which were not fully release from hard time with Muslim group, Busthanul knows well the strategy to face the ruler. He thought that the frontal demand will not be a good way in this situation. He tried to find the

way to gain Soeharto's symphaty that he would like to listen to the political and legal aspiration of Muslim people. One role that Busthanul played was taking part in the birth of the Act no. 7/1989 on Religious Court.

The issue on the enactment of the legal draft to be a formal law became the subject of lively and high-contested debates at that time. There have been many challenges and protests coming from not only outside Muslims but also, and this is a strange, inside Muslim group. These Muslims are they who had got contamination and had been influenced by colonialist's way of thinking. The non-Muslim group claimed the enactment of rulings on Religious Court will danger the unity of the country. The act will soften the way for Muslim people to make Indonesia become an Islamic state. Still, other says that the act on Religious Court is really an implementation of Jakarta Charter and this will danger the unity and the integration of Indonesia. On this matter, a scholar Franz Magnis Suseno commented that if Religious Court was given competency and institutionalized, such will consequent to lessening the competency of state to non-state. In other word, Magnis said, it weaken the power of state and spare it to non-state institution. (Zuffran Sabrie, ed, 1990: 32-33). Furthermore, this Chatolic priest continued, Muslim people will ask more and more, as the aphorism said, "Muslim people will ask the whole finger once they get one finger." (Zuffran Sabrie, ed, 1990: 37).

S. Widjojo, also a Chatolic, stated that the existence of legal draft on Religious Court is clearly an effort of Muslim to execute Islamic law in Indonesia. This, at the next step, will

be used to achieve their purpose of creating Islamic state. S. Widjojo even directly accused the Religious Minister, Munawir Sjadzali, has committed betrayal with the right extremist group (DI/TII) for this purpose. (Zuffran Sabrie, ed, 1990: 78-79).

Of non-Muslim scholars, Victor Tanja can be considered a bit moderate and sympathy in his respond. Victor explained that he can understand the intention and the need of Muslim people concerning the existence of Religious Court in the context of political and social life of Muslim in Indonesia, whose ideology is Pancasila. He even asked all the components of society to understand what Muslim people wanted. For Victor, in the history of state in the world, no law in the society can be legitimated outside the state control. It is the state that enacted the law for society, not private institutional power. Victor also view that the legal draft on Religious Court will not bring to the execution of Jakarta Charter. (Zuffran Sabrie, ed, 1990: 65).

In such high tension and polemic situation, some Muslim leaders who supported for a stronger status and better image of Religious Court has always tried to answer each criticism. They are, for example, Muhammad Natsir, H. Rasjidi, Yusril Ihza Mahendra, and Ismail Sunny. Yet, the most comprehensive and systematic argument was presented by Busthanul. He consistently come to the front to defend the political right of Muslim people. Having had expertise in law; secular as well as Islamic law, Busthanul clarified to all parties who rejected the draft. Busthanul has conducted as government's spokesman to defend the draft

and as the actor in the enactment of the Act No. 7/1989 on Religious Court.

At the time the draft still within the discussion in House of Representative in early 1989, there is a risky situation. It is said risky and delicate with regard to the ratio of voter and unequal political strength in Parliament. The section of PDI party and Indonesian Armed (ABRI) forces demanded that the title of the Act changed to 'Act on Islamic Court'. Then, in paragraph on consideration (Mengingat...) it should put 'based on constitution 1945 chapter 29'. Their argument is that the naming 'Islamic' suits to the fact that the court will only apply the law of Islamic religion.

This demand seems trivial and simple. But, there is actually fundamental and critical problem which brings out significant implications regarding the understanding of the relation of state and religion. This is more complicated since Indonesia has had experienced for centuries the political disintegration by Dutch that destroyed and up side down the perception on Islamic law. (Busthanul , 2001: 40-41).

The demand from the two sections in House of Representative is a clear fact that there are still many Indonesian people who were confusing syari'ah and law. This misunderstanding was intentionally and systematically designed by colonialist to perpetuate their power in the colony land. The demands of the two sections in House of Representative was finally argued by the government, in this matter Ministry of Religious Affairs, Munawir Sjadzali, who then delegated the task to Busthanul.



The main points of Busthanul arguments, in the behave of government, at that time were as follows:

*"If we talk about the origins of law, please be informed that all human laws basically originated from religion. Our positive law in the time being, which was generated by Dutch and has currently been applied by General National Court, High Court and Supreme Court, in Civil and Criminal law, all these are coming from the teaching of Christian. By this logic, the General National Court and High Court should accordingly be named as general Christian Court and Christian High Court. Such is the case with the Supreme Court, it should be named as Christian Supreme Court. Prof. Mr. L.J. van Apeldorn writes that every law is substantially moral value which is positively enacted and sanctified by the government. In our country's case, brought to it by Dutch, the moral value is taken from Christian teaching. So, this is the consequence if we are to accept the demand from the section of PDI and Indonesian Armed (ABRI) forces in House of Representatives. If they demand the label 'Islam' put in the court of Muslim people, then the identity of christian should also be attached to the national court in all levels. (Busthanul, 2001: 40-41).*

This is the main point of Busthanul. He conveyed his ideas slowly, surely, relax, and simply. Busthanul actually has already conceived this idea since he was a student of law. His obsession is to integrate the three systems of law in Indonesia and make Islamic law become an authoritative source of national law.

One condition for the birth of the Act on Religious Court is the fact of legal pluralism and legal uncertainty in Indonesia and the differences of regulation given to Religious Court and its competency. In Java and Madura, the Religious Court was regulated by Staatblad year 1882 No. 152 and by Staatblad year 1937 No. 116 and 610. Its competency covers marriage, divorce, reconciliation before final divorce, and related aspects of marriage cases.

Differently, in South Kalimantan, Religious Court was regulated using Staatblad year 1937 No. 638 and 639. In this ruling, the name for Religious Court is "Kerapatan Qadhi" (the judgement of judge) in the first level and "Kerapatan Qadhi Besar" (big judgement) for the appeal level. Outside Java, Madura, and Kalimantan, the Religious Court was regulated with State Regulation No. 45 year 1957, and the name is "Religious Court" itself. This state regulation to some extent still has colonial influence, since it put the sentence "according to the living law". What is more, the inheritance cases of Muslim people can be legitimately decided by non-Religious Court also. (Busthanul, 1996: 90-91).

With the birth of the Act No.7/1989, the pluralism of the name and the competencies of Religious Court can be diminished. This Act will create the unity of regulation for Islamic court within the frame of national legal system, whose basis is Pancasila and the Constitution 1945.

One of the most interesting experience and achievement of Busthanul during his struggling for the legal draft was his effort and his success to take President Soeharto's heart and attention for the goal mentioned above. The trust Busthanul get from that man of power, who was wellknown for his tough, rigid and authoritarian, is an important provision. Busthanul was able to ensure Soeharto that the legal draft on Religious Court is really an implementation of Pancasila and Constitution 1945 about living together as a nation. It is the group of the con's to the legal draft that should be suspected as disloyal to Pancasila. Busthanul is exactly true, since Pancasila says in its first article "Believe in the One God", which

means to clearly accomodate and give right to each citizen to conduct his/her religion. The Constitution 1945 also guarantees the people of each religion to conduct their religion and believe. According to Busthanul, if President Soeharto was argued by using the Pancasila and Constitution approach, he will enthusiastically respond and accept. (Busthanul, 28 Juni 2001)

## CLOSING

The above explanation wants to explain that the condition of Islamic law in Indonesia during the colonization era is truly apprehensive, to the effect that the nation doesn't have the unity of law even after its independence. This was caused by the strong and firm influence of Dutch's way of thinking to Indonesian people, that they believed in the contradiction of the three laws ; Islamic law, Adat law and State law. In this political policy of 'Bamboo craking' Dutch has sided with Adat law.

To Busthanul, the seemingly conflict between the three laws is only *quasi conflict*, not real. For this problem, there must be fundamental and insisted effort to solve the made conflict. To Busthanul, the first thing to do is creating an agreement on the meaning and perception of the term of Syari`a and Fiqh. Second, legislating the law which suits the culture, value and the need of Indonesian people. In this point, Busthanul has played a central role in legislating Islamic law into National law. Among his crucial achievements is to increase the status and the image of Religious Court, through his role as the actor for the birth of the Act No. 7/1989 on Religious Court.

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